CLR International Trading GmbH v Ng Khai Huat (t/a Lasting Impressions Marketing)

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–2075 OF 2008
MARY LIM J
18 JULY 2011

Contract — Sale of goods — Sale by advertisement on Internet — Defendant agreed to find buyer for plaintiff — Whether there was agreement between parties on terms claimed by plaintiff — Whether machine was defective and of unmerchantable quality — Whether defendant had lien over machine — Whether defendant was liable to plaintiff for sum of €227,000 — Counterclaim — Whether plaintiff was liable to defendant for repair works and storage charges — Whether plaintiff was liable to defendant for damages for assault and harassment

When the plaintiff, a company incorporated in Germany, placed an advertisement in the Internet offering a used printing press ('the machine') for sale at €227,000 or RM1,098,680, the respondent, a broker in the business of buying and selling second hand machines, responded to the offer. However, instead of buying the machine outright from the plaintiff, the parties had allegedly agreed that the defendant would find a buyer for the machine. In addition, the defendant had also agreed to bear all expenses for storage and any repairs that would need to be carried out on the machine, before selling the machine at a price higher than €227,000. The difference between the plaintiff's price for the machine and the defendant's sale price represented the defendant's commission. The machine was then delivered to the defendant's associate's warehouse and stored there until the defendant was able to find a suitable buyer. The defendant had then allegedly sold the machine to a buyer in Hong Kong for HK1.6m but failed to pay the plaintiff. The plaintiff thus commenced the present action to recover the price of the machine but the defendant denied liability to the plaintiff for the sum of €227,000. The defendant claimed that when the machine was shipped to him it was in a bad condition and was so damaged that extensive repairs had to be carried out to make it operable. The defendant also claimed that the plaintiff had agreed to make progressive payments for the repairs of the machine. The defendant further submitted that he had suffered trauma and shock as a result of the actions taken by the plaintiff towards recovering its money, which included, inter alia, threats made by the plaintiff's employees and/or agents against him and his family. The defendant thus counterclaimed for the sum of RM773,000 as maintenance, repair works and storage charges and damages for assault and

infringement of his and his family's right to personal safety. The plaintiff denied the claims set out in the counterclaim.

Held, allowing the plaintiff's claim with interest and costs:

(1) After having scrutinised the contemporaneous documentary evidence tendered at trial, in particular the emails exchanged between the parties, and based on the conduct of the parties it was found that there was a properly concluded agreement between the parties whereby instead of buying directly from the plaintiff, the defendant agreed to sell the machine for the plaintiff. The plaintiff's testimony was consistent and credible, supported by the trail of emails, which established that the defendant as a broker in the business of buying and selling used printing presses had undertaken the task of assisting the plaintiff in selling the machine from his part of the world. Further, the court also accepted the plaintiff's evidence that this was a fixed price contract of €227,000. In the circumstances the defendant could not validly argue that there was no agreement or that there was no agreement on the terms as claimed by the plaintiff (see paras 14–18, 22–24).

(2) The fact that the shipping documents, namely the bill of lading, invoice and packing list all carried the defendant's name and address as consignee showed that the defendant was involved in the shipment and importation of the machine. There was no evidence of the defendant protesting against the contents or accuracy of the contents of these shipping documents at the relevant time or at any other time. Instead he had provided the contact details and actively participated in the shipment and storage of the machine at his associate's warehouse (see paras 19–21).

(3) Although the defendant claimed that the machine was defective and damaged he neither complained to the plaintiff nor rejected the machine after he collected delivery of it. In fact, throughout the period from the acceptance of the machine to the time he sold it to the third party buyer there was not a single piece of evidence supporting the defendant's allegation on the damaged condition of the machine. With two directly conflicting versions the court also turned to the silent independent evidence in the form of photographs. Having carefully examined these photographs, it was found that the machine was not in as bad a condition as claimed by the defendant and that the repairs that were carried out by the defendant were not in respect of the 'functionability' of the machine. As such, it was not now open to the defendant to complain and renege on the deal (see paras 27–33).

(4) In his email to the plaintiff, the defendant had specifically agreed to bear all costs of repairs to the machine. As such, the loss would lie where it fell and the defendant was liable for these costs (see paras 34–36).

(5) The defendant's right to retain the proceeds of sale was only by virtue of being an owner or having a lien over the debt due for rentals and cost of repairs. A lien could not exist unless there was a debt. Since the defendant had agreed to bear all costs, no debt in fact accrued and in these circumstances the defendant had no right or lien over the machine (see paras 37–38).

(6) The burden of proof was on the defendant to prove that repairs were necessary and that these were to the extent as claimed. However, the defendant did not call any of the persons involved in the repairs to testify and there was also evidence that some of the repair work was incompetently done. In any case, the cost of repairs did amount to the sum of HK1.6m that the defendant had received from the sale of the machine and which had to be accounted for (see para 43–45,47–50).

(7) Other than the defendant's own testimony, there was no other evidence to corroborate his claim of assault and harassment. In the circumstances the counterclaim in this regard must also be dismissed (see paras 51–55).

[Bahasa Malaysia summary

Apabila plaintif, sebuah syarikat yang diperbadankan di negara Jerman, telah meletakkan iklan dalam internet menawarkan percetakan akhbar terpakai ('mesin tersebut') untuk dijual pada harga €227,000 atau RM1,098,680, responden, seorang broker dalam perniagaan jual beli mesin terpakai, telah menerima tawaran itu. Walau bagaimanapun, daripada membeli mesin itu secara terang-terangan daripada plaintif, pihak-pihak dikatakan telah bersetuju agar defendan mencari pembeli untuk mesin itu. Tambahan pula, defendan juga bersetuju menanggung semua perbelanjaan untuk simpanan dan apa-apa pembaikan yang perlu dilakukan ke atas mesin itu, sebelum menjual mesin itu pada harga yang lebih tinggi daripada €227,000. Perbezaan antara harga plaintif untuk mesin itu dan harga jualan defendan merupakan komisyen defendan. Mesin itu kemudian telah dihantar ke gudang bersekutu defendan dan disimpan di situ sehingga defendan dapat mencari pembeli yang sesuai. Defendan kemudian dikatakan telah menjual mesin itu kepada pembeli di Hong Kong untuk HK1.6 juta tetapi telah gagal membayar plaintif. Plaintif dengan itu telah memulakan tindakan ini untuk mendapat balik harga mesin itu tetapi defendan menafikan liabiliti terhadap defendan sejumlah €227,000. Defendan mendakwa bahawa apabila mesin itu dihantar melalui kapal kepadanya ia berada dalam keadaan tidak baik dan rosak sehingga banyak pembaikan terpaksa dilakukan untuk membuatnya beroperasi semula. Defendan juga mendakwa bahawa plaintif telah bersetuju membuat bayaran ansuran untuk pembaikan mesin itu. Selanjutnya defendan berhujah bahawa dia telah mengalami trauma dan kejutan akibat tindakan-tindakan yang diambil oleh plaintif untuk mendapat balik wangnya, termasuklah, antara lain, ugutan yang dibuat oleh pekerja dan/atau ejen plaintif terhadap keluarga dan dirinya. Oleh itu defendan telah menuntut balas untuk jumlah RM773,000

sebagai caj-caj penyelenggaraan, kerja pembaikan dan simpanan dan ganti rugi kerana serangan dan pelanggaran hak dia dan keluarganya untuk mendapat keselamatan peribadi. Plaintif telah menafikan tuntutan-tuntutan yang dinyatakan dalam tuntutan balas.

Diputuskan, membenarkan tuntutan plaintif dengan faedah dan kos:

(1) Setelah meneliti keterangan dokumentar semasa yang ditenderkan dalam perbicaraan, khususnya pertukaran emel antara pihak-pihak, dan berdasarkan perlakuan pihak-pihak maka didapati bahawa terdapat perjanjian yang telah disempurnakan dengan wajar antara pihak-pihak di mana daripada membeli terus daripada plaintif, defendan telah bersetuju menjual mesin itu untuk plaintif. Testimoni plaintif adalah konsisten dan boleh dipercayai, disokong oleh rentetan emel-emel, yang membuktikan bahawa defendan sebagai broker dalam perniagaan membeli dan menjual mesin cetak terpakai telah melaksanakan tugas membantu plaintif menjual mesin itu dari negaranya. Selanjutnya, mahkamah juga menerima keterangan plaintif bahawa harga tetap kontrak berjumlah €227,000. Dalam keadaan ini defendan tidak boleh secara sah berhujah bahawa tidak terdapat perjanjian atau bahawa tidak ada perjanjian atas terma-terma yang dituntut oleh plaintif (lihat perenggan 14–18, 22–24).

(2) Fakta bahawa dokumen-dokumen perkapalan, terutamanya bil muatan, invois dan senarai pembungkusan semua mempunyai nama dan alamat defendan sebagai penerima menunjukkan bahawa defendan terlibat dalam penghantaran melalui kapal dan import mesin itu. Tiada keterangan defendan membantah terhadap kandungan atau ketepatan kandungan dokumen-dokumen perkapalan pada masa berkaitan atau pada bila-bila masa lain. Sebaliknya dia telah mengemukakan maklumat untuk dihubungi dan terlibat secara aktif dalam penghantaran kapal dan simpanan mesin itu di gudang bersekutunya (lihat perenggan 19–21).

(3) Walaupun defendan mendakwa bahawa mesin itu tidak berfungsi dan rosak dia tidak membuat aduan kepada plaintif atau enggan menerima mesin itu selepas dia mengambil penghantaran itu. Bahkan, sepanjang tempoh dari saat penerimaan mesin itu hingga saat dia menjualnya kepada pembeli pihak ketiga tidak ada keterangan untuk menyokong dakwaan defendan berhubung keadaan rosak mesin itu. Berdasarkan dua versi yang bertentangan mahkamah juga telah menggunakan keterangan berasingan dalam bentuk gambar. Setelah meneliti gambar-gambar berikut, adalah didapati bahawa mesin itu tidak berada dalam keadaan yang rosak sebagaimana yang didakwa oleh defendan dan bahawa pembaikan yang dilakukan oleh defendan tidak berkaitan dengan 'functionality' mesin itu. Oleh itu, defendan tidak boleh membuat aduan atau mungkir dengan perjanjian tersebut (lihat perenggan 27–33).

(4) Dalam emelnya kepada plaintif, defendan secara spesifik bersetuju

menanggung semua kos pembaikan mesin itu. Oleh itu kerugian terletak pada defendan yang bertanggungjawab terhadap kos tersebut (lihat perenggan 34–36).

(5) Hak defendan untuk menyimpan hasil jualan hanya sebagai pemilik atau mempunyai lien terhadap hutang yang perlu dibayar untuk sewa dan kos pembaikan. Lien tidak mungkin wujud kecuali terdapat hutang. Oleh kerana defendan telah bersetuju untuk menanggung semua kos, pada hakikatnya tiada hutang terakru dan dalam keadaan berikut defendan tiada hak atau lien terhadap mesin itu (lihat perenggan 37–38).

(6) Beban bukti terletak pada defendan untuk membuktikan bahawa pembaikan itu perlu dan bahawa ia setakat mana yang dituntut. Walau bagaimanapun, defendan tidak memanggil sesiapa terlibat dalam pembaikan tersebut untuk memberi keterangan dan terdapat juga keterangan bahawa ada kerja pembaikan yang tidak siap dibuat. Dalam apa keadaanpun, kos pembaikan telah berjumlah HK1.6 juta yang diterima defendan dari jualan mesin itu dan yang terpaksa diambil kira (lihat perenggan 43–45, 47–50).

(7) Selain daripada keterangan defendan sendiri, tiada keterangan lain untuk menyokong tuntutannya untuk serangan dan gangguan. Dalam keadaan ini tuntutan tersebut juga patut ditolak (lihat perenggan 51–55).]

Notes

For cases on sales of goods in general, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5927–5931.

Cases referred to

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497, HC (refd)

R v Ireland [1998] AC 147, HL (refd)

Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)

KY Leong (Sothi, Leong & Partners) for the plaintiff.

Lathika Prabhakaran (Lathika & Associates) for the defendant.

Mary Lim J:

BACKGROUND FACTS

[1] The plaintiff is a company incorporated in Germany with an address in Mannheim, Germany. The defendant is an individual residing in Kuala Lumpur. He trades under the name and style of 'Lasting Impressions Marketing' in Setapak, Kuala Lumpur. The defendant is a broker and has been

since the mid-1990s. His business is to broker the sale and purchase of second-hand Machine machines in Europe and Asia. He has an established network of business contacts worldwide. His job includes making arrangements for the delivery of Machine machines from abroad, unloading, refurbishing, installing and carrying out test prints. Sometimes, his customers in China and Indonesia will send machines purchased in Europe to be overhauled by him here in Malaysia before installation in their home country. He outsources most of his jobs to others, such as freight forwarders, painters and machine repairers.

[2] The plaintiff bought a used offset printing press (the Machine) from a Belgium company known as Marlier Brothers Co for €189,000. It bought the Machine with the intention of reselling it to a customer in China. But, the customer encountered problems financing the purchase and so the defendant decided to reduce its price and look for another customer for a 'quick sell'. In December 2004, the plaintiff placed an advertisement in the internet offering the Machine for sale in the following terms:

> We can offer as owner (subjected to prior sale)
>
> Ref 01-0312
>
> Komori Lithrone 440
>
> Built 1993
>
> S/N 989
>
> Impressions 115 mlo
>
> PQC ink and register control
>
> Komorimatics dampening with Royse refrigeration and recirculation
>
> SAPC (semi automatic plate change),
>
> AMR Preset (automatic make ready),
>
> chromed impression cylinders
>
> automatic ink roller — blanket and impression cylinder washing device, plate cooking, plate punch and bender
>
> electronic doubleside and sidelay control
>
> transformer, spare part ink rollers, spare part dampening rollers
>
> PSS Plate scanner (delivery about 1 month later, in use with other machines until new 8 color machine will be installed),
>
> All functions of the machine are working, no damage to gears and cylinders
>
> Weko inomat powerspray, sheet decurler

A will be dismantled in 1 – 2 weeks

regular maintenance, documentation available

located in Belgium

pictures on request

B Price LOT 218,000 euro

[3] The defendant expressed interest and responded by email dated 6 December 2004 to the plaintiff. The plaintiff claimed that instead of an C outright sale to the defendant, the defendant agreed to resell the Machine for the plaintiff. The defendant was said to have also offered to help the plaintiff out with its customer in China. Unfortunately, that was unsuccessful. The defendant then informed the plaintiff that there were three interested buyers but these potential buyers wanted to see the Machine run 'a print test'. But, D because these potential purchasers needed to view the Machine and see it run a 'print test' before making a purchase, the Machine had to be shipped to the defendant here in Malaysia. The Machine was first shipped from Belgium to Hong Kong and later to Malaysia. The defendant is alleged to have agreed to bear the costs of storage and any repairs to the Machine. The plaintiff's price for E the Machine was said to be €227,000. The defendant was supposed to sell the Machine at a price higher than that price and the difference between the two sets of figures was said to then represent the defendant's 'commission'.

[4] In defence and in his counterclaim, the defendant claimed that the F plaintiff wanted to take advantage of his experience and requested his assistance in facilitating the 'China deal'. He agreed and had met the prospective buyer in China but the deal was unsuccessful. The defendant alleged that the plaintiff repeatedly asked him to store the Machine in Malaysia and to 'take charge of it with a view to finding a buyer'. He agreed 'but only if my conditions were met'. G Those conditions being 'only if the Plaintiff gave me full information and we agreed on the specifications and condition of the Machine; the storage space it would occupy; the work involved in arranging for demonstrations of the Machine; the proposed purchase price of the Machine; and the commission which the Plaintiff was willing to pay to me for my services'. Because those H terms were not met, the defendant took the position that there was no agreement reached. However, the defendant told the court that he finally gave in to the plaintiff's persuasions and decided to 'see what I could do to help him out. However, I did not commit myself to anything, I said, 'See how it goes'.

I **[5]** Subsequently, without the defendant's consent and agreement, the Machine which had been reconditioned in Hong Kong was 'transported to me in Malaysia' on 25 April 2005 and the defendant said he was asked by the plaintiff 'to source out a buyer for the machine'. The Machine was then delivered to the defendant's associate, Ben Lee's warehouse at No 13, Jalan 10,

Taman Merati Jaya, 47100 Puchong, Selangor Darul Ehsan on 29 April 2005. The off-loading of the Machine was overseen by both parties and assisted by several other persons.

[6] The defendant claimed that when the Machine was shipped to him, it was in an extremely poor condition and was so damaged that extensive repairs had to be carried out to make the Machine completely operable. According to the defendant, the plaintiff had agreed to make progressive payments for the repairs of the Machine. When the plaintiff failed to make those payments, the defendant claimed that he had a right to exercise a lien over the Machine and sell it off as if it was his. The defendant sold the Machine to World Tech Engineering Co in Hong Kong (World Tech) for HK1.6m. He then counterclaimed for the costs incurred in storage and repairs.

[7] In addition, the defendant claimed damages suffered in relation to trauma and shock that he allegedly experienced as a result of actions taken by the plaintiff towards recovering its money. The defendant told the court that the plaintiff had sent a debt collector by the name of Ah Soon to collect the monies from him. Ah Soon went with a companion called Ah Weng. When he informed Ah Soon that he was disputing the plaintiff's claim, Ah Soon insisted aggressively that the defendant furnished him with details, documentation and photographs relating to the dispute. Ah Soon then called a few people on his handphone, including one Ah Keong and another called 'Rocket' from Petaling Street. In the course of his confrontation with these people, the defendant claimed that Ah Soon received a call from one Yong Kai Ritmman and insisted that he, the defendant spoke with her. She, together with PW1 was supposedly in Hong Kong at that material time. The defendant did and he claimed that this Yong Kai Rittman used 'abusive words on the Defendant and demanded the return of the money claimed by the Plaintiff together with interest. She then threatened to 'get people to kill' the Defendant's immediate family members including those currently living with his elderly mother in Setapak, Kuala Lumpur'.

[8] The defendant contended that he was wholly and extremely traumatised and shocked by all these threats made against him and his family that it caused him an apprehension of the infliction of battery and harm to him and his family by the plaintiff, its employees and agents. He believed that he and his family members were in grave and mortal danger of being harmed or killed by the plaintiff and the persons mentioned that he lodged a police report. As a result of this, the defendant claimed damages for assault and infringement of his and his family's right to personal safety.

[9] The plaintiff has denied this counterclaim, fundamentally pleading that

A it has no knowledge of both the persons named and the events enumerated.

ISSUES TO BE TRIED

[10] Six issues have been identified by the parties for determination:

B

(a) whether the defendant is liable to the plaintiff for the sum of €227,000 (RM1,098,680) as the price of a used offset Machine namely 'Komori Lithrone 440S/N 989 Built 1993' together with accessories (Machine);

C

(b) whether the plaintiff is liable to the defendant for the sum of RM773,000 as maintenance, repair works and storage charges for the Machine incurred by the defendant;

(c) whether the Machine was defective, not of merchantable quality and/or unfit to be used as a Machine;

D

(d) what are the terms of the agreement between the parties?;

(e) whether the defendant was entitled to exercise a lien over the Machine; and

E

(f) whether the plaintiff is liable to the defendant for damages for assault and infringement of the defendant and his family's legal right to personal safety.

[11] I propose to take the first five issues together seeing that they are F inter-related. The first and second issues in fact address the very claim and the counterclaim. The determination of the fourth, third and fifth issues in that order as identified will answer these first two issues. The last issue, which is the sixth issue, stands entirely on its own although factually, it develops from the backdrop of facts against which the earlier issues are considered. As this case G turns completely on the facts as testified by the witnesses called by both sides; I shall be referring to their evidence fairly extensively together with the documentary evidence adduced.

IS THERE AN AGREEMENT?

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[12] It would appear from the defendant's case and from both the written and oral submissions made by Miss Lathika Prabhakaran, learned counsel for the defendant that the principal argument advanced is that there is not even an agreement between the parties. That being so, the correct poser should be I whether there is an agreement between the parties. If so, what then are the terms? Otherwise, the issues posed presuppose that there is already in existence an agreement and the dispute is over what those terms are.

[13] It is the plaintiff's claim that the arrangement between the parties was

that the defendant had agreed to find a buyer for the Machine, bear all expenses for its storage and any repairs carried out, and then sell it at a price higher than the plaintiff's price. The difference would then form the defendant's 'commission'. Since the defendant had sold the Machine for HK1.6m, the plaintiff claimed that it was entitled to be paid his price.

[14] From the testimonies of the witnesses and the documentary evidence tendered, if there was any agreement upon which the plaintiff's claim is to be founded, it must be one that was partly in writing and partly oral. Having heard the witnesses, especially PW1 and the defendant himself; and having carefully scrutinised the contemporaneous documentary evidence tendered at trial, in particular the emails exchanged between the parties; and not forgetting the conduct of the parties, specifically that of the defendant, I am convinced that there is indeed a properly concluded agreement between the parties of the nature described by the plaintiff. the plaintiff's testimony is consistent and credible, supported by documentary evidence. This documentary evidence is not only contemporaneous but many of them emanated from the defendant himself, especially his emails. Such evidence is strong and with no rebuttal evidence, explanation or clarification forthcoming from the defendant, such cogent evidence irresistible sides and confirms the plaintiff's case. This is what and how each piece of evidence was evaluated and fully considered.

[15] The plaintiff started off by first placing an advertisement in cyberspace — the internet, inviting offers to buy the Machine. That advertisement is in the terms set out earlier. Mr Michael Rittman (PW1), the managing director of the plaintiff, was the person in touch with the defendant, be it through emails, telephone calls or meetings in person. From the exchange of emails that then followed between the parties, I am satisfied that both parties finally did conclude an agreement where instead of the defendant buying directly from the plaintiff, the defendant agreed to sell the Machine for the plaintiff.

[16] From the statement of agreed facts and the defendant's evidence-in-chief, the existence of a prospective buyer from China is not in doubt. While there was some debate over whether the defendant was sent to meet this buyer or that he offered to go on the plaintiff's behest; that is not really important. What is important is that the defendant did travel to China and he did meet with this prospective buyer. Apart from it being an agreed fact, this buyer is clearly not fictitious. Although that China deal was not successful, the defendant did testify that he then informed the plaintiff of three prospective buyers who were interested in the Machine but who wanted to see the Machine run 'a print test' first before buying. These prospective buyers were said to be 'reluctant to travel overseas for the inspection'. According to PW1, it was the defendant who suggested that the Machine be delivered to the defendant's warehouse in Malaysia 'for the convenience of the interested parties

to inspect the Machine'. I cannot see why the defendant would make this journey as well as inform the plaintiff of the existence of three prospective buyers but for the presence of an agreement between the parties.

[17] From the trail of emails, it appears that the parties quite quickly established what can only be described as a relationship that was congenial and workable and was in fact working; at least at the start. Again, this would not have been possible but for the existence of an agreement. This relationship was such that the parties appear to be able to deal with more than one machine or deal with machines other than the Machine. This is obvious from the contents of two emails dated 24 August 2005 and 30 August 2005 sent by the defendant. In the first email, the defendant informed PW1 that he had 'found an interested buyer for your L440 1993' and that there were two scenarios to the deal; either through a trade in or through an outright sale with a grace period for full payment. In the second email, the defendant informed the plaintiff that he will 'propose this machine to my customer'. However, before he could do that, he needed the plaintiff to let him know the plaintiff's 'C & F, Malaysia selling price' to the defendant because he intended to get the customer 'to either pay for the L440 and let him use this L540 1998 for a month or buy this machine up front and continue to use the L440 until I get another customer. (But my guess is he'll buy both!!!)'.

[18] In my view, the contents of the emails and the conduct of the parties are consistent with that generally expected of a party who has agreed to undertake the task of assisting the other party in selling the Machine from his corner of the world. Since the defendant is a broker in the business of selling and purchasing of second-hand printing presses, he surely must be more than familiar with the handling of such transactions. After all, he has been in this business since the mid-1990s. He would have understood the meaning and implications of his actions. If there was anything that was liable to be misconstrued, he ought to have put right immediately. It is reasonable to say that the fact that he did not must mean simply that there were none. In fact, the defendant's emails show that he was extremely familiar with the handling of the various procedures involved in the shipment and importation of the Machine.

[19] Aside from the emails, it cannot be overlooked that the defendant is the named 'consignee/importer' in the pro forma invoice dated 18 April 2005 (exh P1) prepared by the plaintiff and which was used by the defendant to bring the Machine into Malaysia and for clearing the port authorities. The Machine was initially shipped from Belgium to Hong Kong and thence to the defendant's warehouse in Malaysia. The shipping documents, namely the bill of lading, invoice (exh P1), packing list all carry the defendant's name and address as consignee.

[20] The defendant further actively participated in the shipment details of the Machine. In his email dated 18 April 2005, the defendant asked to be 'advised of the shipment schedule, reminded the Plaintiff to include the packing list, invoice, together with BL for the shipment by courier. Please mention at the footnote of the invoice 'No commercial value. For Customs purposes only'. In another email dated 22 April 2005, the defendant asked PW1 to 'contact HK side forwarder to at least provide the airway bill number for the couriered BL asap. Otherwise, it will be stranded for another few days upon arrival'. He then suggested that PW1 instruct the shipper to 'Auto/Telex Release'. The plaintiff did so accordingly save for the last suggestion. Because a pro forma invoice had already been issued at that time, the plaintiff issued another, this time carrying the remarks advised by the defendant. As for the suggestion on the bill of lading, the defendant followed that up with another email of the same day where he stated:

> 1 have received the fax BL but it is not stated that it is auto release or telex release. In this case, we still need the original before we can clear the goods …

[21] If the defendant had nothing to do with the Machine let alone as 'consignee/importer'; and if there was no agreement between the parties which he now claims; it is difficult to see why he did not protest or correct the contents or accuracy of the contents at the relevant time or at any time. Instead, he can be seen quite happily providing his contact details; allowing his name and details to appear in the pro forma invoice and bill of lading; discussing about dismantling of the Machine and the timing of that work; actively assisting in the paper work relating to the shipment and clearance of the Machine from the authorities at Port Klang, including acknowledging delivery of the Machine and clearing the same; before finally arranging for the Machine to be sent to a warehouse at Puchong. There, PW1 and the defendant together with five or six others unloaded the Machine at the warehouse belonging to the defendant's associate, Ben.

[22] Insofar as the price that was expected by the plaintiff, I accept the PWTs evidence that this was a fixed price contract of €227,000. This is borne out by the pro forma invoice which I have already discussed just a moment ago. This sum is the same or within the range of prices that the plaintiff was asking from the prospective buyer in China, that is, 'between 227,000 and 230,000 Euros' as testified by the defendant himself in his evidence-in-chief. This price is not unrealistic or too high given that the defendant had himself offered similarly ranged prices to Weng Hwa Press and others.

[23] There is yet another telling piece of evidence from the defendant himself about the nature and agreed terms between the parties. In his email dated 6 December 2004 to PW1, the defendant told PW1 to delay dismantling

the Machine 'as it would fetch a higher price. I had potential buyers in Malaysia and Indonesia until January 2005 who may have been interested in buying the machine'. Again, in his email dated 17 March 2006 already referred to earlier, the defendant's discussion of the prices sought by his customers indirectly confirms that arrangements between him and the Plaintiff; that the defendant agreed to sell the Machine at a price higher than the plaintiff's price. The difference between the two sets of figures would be the defendant's 'commission', and this sum would be sufficient to cover any costs incurred in any repair of the Machine.

[24] In the face of all this evidence, I cannot see how the defendant can validly argue that there was no agreement or that there is no agreement on the terms as claimed by the plaintiff. The Machine may have had problems, and for this I will come to it shortly; but these same facts show that the defendant had agreed to be responsible for its storage and repairs before sourcing for a buyer, and I would say; he did so quite readily. The plaintiff could not have come to know of the address of the defendant's associate called Ben and Ben's warehouse at Puchong if not for the defendant providing the same to the plaintiff. I therefore find that there is indeed an agreement between the parties, that the defendant agreed to purchase the Machine at €227,000. The defendant was to secure a sale at a price higher than the purchase price so that the difference between the two sums would form his commission. Pending such sale, the defendant would bear the costs of storage and repairs, if any.

WHAT WAS THE CONDITION OF THE MACHINE?

[25] Moving on to the matter of the condition of the Machine upon arrival in the country.

[26] The defendant claimed that when he agreed to accept for sale, it was on the condition that the Machine, inter alia, was in a good condition. He contended that at the time when the Machine was off-loaded, it was 'in a deplorable and filthy state. It was defective in many ways and it certainly could not be used as a printing press. It was not re-conditioned and in fact was damaged. It had been dismantled into more than 100 separate parts. The parts of the machine had been thrown about on top of each other … The parts had not been packed or shipped in a seaworthy condition … All the parts should have been sprayed with anti-rust and cling wrapped for protection against incoming sea-water, rainwater and vapour … I saw that many of the visible surfaces were beginning to rust and corrode … Many of the parts of the machine were missing or damaged'. He then proceeded to give details of what those parts were. In short, the defendant claimed that the Machine was defective, unfit for its purpose as a printing press and was not of merchantable quality. It was said to be worth scrap value of RM50,000.

[27] I find it difficult to accept this contention of the defendant as it is not supported by evidence. If the Machine was in the condition claimed by the defendant, I would have expected complaints, repeated complaints even to the plaintiff at the material time; and soon after. There is an ominous silence in this regard on a matter which is so vital to the whole transaction.

[28] It is also somewhat puzzling that the defendant did not at any time reject the Machine which he was perfectly entitled to do in light of its alleged bad condition. After all, as an experienced broker, particularly one dealing with used printing presses, he must be familiar as to the appropriate actions in such circumstances. Yet, there were no complaints or evidence of such complaints, save for his oral testimony in court which is disputed by PW1 who was himself present at the time of unloading of the Machine at the warehouse at Puchong. Throughout the period from acceptance of the Machine to the time of sale to World Tech Engineering, there is not a single piece of evidence in any form supporting the defendant's allegation on the condition of the Machine. Instead, PW1 testified that he had noticed that several parts of the Machine, that is, the vacuum pump, plate punch and manual were missing at the time of the unloading. He then sent these parts to the defendant at its own expense and this is not disputed by the defendant.

[29] The absence of these parts does not appear to have affected the performance of the Machine. There is evidence of the defendant demonstrating and doing test prints of the Machine to prospective buyers. In his email dated 13.7.2005, the defendant informed the plaintiff of the results of a print test that he had carried out:

> We have test printed today. It turned out fine but there is one problem. After 500 sheets or more, the printing has double tone. Reason is because the whole set of wires/sockets for the SAPC were missing and we had to use the wires/sockets from the auto wash. As such, the AMP and OHM is different.

[30] The plaintiff was then asked to check on the availability and price of the wires/sockets as he could not find the part number from the manual. Apparently, one of the parts, the plate clamps auto releases came loose 'after a few hundred revolutions' thereby causing the double tone in the print done.

[31] Further, it is interesting to note that both the defendant and PW1 were in fact present at the material time. Both helped in the unloading of the Machine together with a few others. Yet, none of those persons who assisted in the unloading were called to testify. The evidence of these persons would have been extremely useful in shedding some light on the condition of the Machine.

These persons were workers of Ben, the defendant's associate and he was therefore in the best position to call them to testify on his behalf but for reasons best known to him, he did not.

[32] With two directly conflicting versions, the court frequently turns to the silent independent evidence often offered in the form of the photographs. Having carefully examining these photographs, I am not convinced the Machine was in as bad a condition as claimed by the defendant. It is obviously a used printing press that has been shipped from Europe to Asia, stored in Hong Kong before making its way to Malaysia. As of the date of transaction, the Machine was just over ten years old. Some signs of travel and age are inevitable and that is what I observe from the photographs. It is also evident that in some of these photographs, the Machine had already been taken apart to be cleaned or assembled. Therefore, the photographs must be properly viewed and appreciated as at the time when they were taken. In fact, I further find that even if there were any repairs to the Machine, it was in respect of matters that did not affect the 'functionability' of the Machine and this accord with the photographic evidence tendered. This must be so as the defendant was soon quite happy showing the Machine to prospective buyers. As early as 13 May 2005, the defendant was already sending quotations to Weng Hwa Press for RM1,550,000, the printers to whom the defendant subsequently delivered the Machine on 12 June 2005.

[33] In the face of such evidence, I can only conclude that the defendant was actually satisfied with the condition of the Machine at the material time. It may not have been in the same condition as the plaintiff last viewed it in Brussels and before it was sent to Hong Kong. Still, the defendant was prepared and did accept the role and obligations as described earlier. That being the case, it is not now open to the defendant to complain and renege on the deal. In any case, between these two principal witnesses, the evidence of PW1 is more credible and supported by the contemporaneous documents; in particular the emails of the defendant himself as opposed to the oral testimony of the defendant which I find frequently riddled with inconsistencies when compared to those same emails. I must also add that if the Machine was in the state as described by the defendant, worth only a scrap metal value of RM50,000, it does not make sense why he should then spend a sum as substantial as RM773,000 just to repair the Machine. The defendant's allegation is quite obviously implausible, entirely unreliable and bare of proof. It is therefore rejected.

WHO BEARS THE COSTS OF REPAIRS AND STORAGE OF THE MACHINE?

[34] As for the question of repairs to the Machine, I find that while there may have been some persistence on the part of the plaintiff, the defendant did agree

to carry out such repairs. This is borne out by the defendant's email dated 24 September 2005 (p 27 bundle A). In this email, the defendant specifically agreed to bear all repairs, parts, re-conditioning, and warranty:

> You should take into account that all repairs, parts, re-conditioning, warranty will be borne by me and you shouldn't worry about bearing extra cost …
>
> Just let me know what you would expect from the sale of the L440 1993.

[35] The parties were well-aware that it was a used printing machine that was being sold. So, in the event any of the parts are missing or the Machine required repair, the defendant had already agreed to bear those costs. It was entirely his decision to do that. He assumed the risks of either low or high costs of repair. In this case, those costs as claimed by the defendant appear to be more than expected but the loss lies where it falls.

[36] This position was not altered when the Machine was delivered to Malaysia from Hong Kong. Although there is reference in the defendant's email dated 26 February 2006 of his concern that the Machine may have been 'tampered with in Hong Kong before arriving here', the defendant, nevertheless, did not request the plaintiff to bear the costs of repairs. If the agreement was that the plaintiff was to bear the costs of these repairs, it would be reasonable to say that there would have either been some claim or reminder from the defendant to that effect. Throughout the relevant period, especially when the Machine was being cleaned or repaired, there is no evidence at all of the defendant reminding or asking the plaintiff to make payments. The defendant's silence in this critical respect is telling of the agreement between the parties, and the defendant's own understanding of that agreement and that is — he is to bear such costs and expenses.

LIEN OVER TIME MACHINE

[37] Moving on to the issue of the defendant's right to exercise a lien over the Machine I shall deal with this issue together with the question of the defendant's counterclaim of RM773,000 which comprised the fllowing:

i	storage rentals at Weng Hwa Press [RM60,000 + USD20.500 + HK$20,000]	RM140,000
ii	unloading & repairs by Excel Point	RM193,000
iii	electrical repairs by World Tech	HK$250,000
iv	costs of parts by World Tech	HK$720,700

[38] The defendant's right to retain the proceeds of sale is only by virtue of being the owner or that he has a lien over the monies because of the debt due

for rentals and costs of repairs which all add up to RM773,000. There is no evidence whatsoever to prove let alone show that the plaintiff had agreed to bear these same costs and expenses or, to make progressive payments towards the same. There is therefore no debt over which a lien may be exercised. A lien cannot exist unless there is a debt. The debt in turn cannot arise unless there is an obligation to pay. Since I have found that the defendant had agreed to bear all costs, no debt in fact accrues. In these circumstances, the defendant has no right or lien over the Machine. Any monies collected from its sale must therefore be accounted for and save for that which was agreed as the defendant's share, if proved, to be repaid to the plaintiff.

COUNTER-CLAIM FOR COSTS OF STORAGE AND REPAIRS

[39] Quite aside from my findings just a moment ago on who bears the responsibility for these expenses, for the sake of completeness and this being a counterclaim, I shall nevertheless deal with whether the defendant is entitled to these claims. I shall take each item at a time starting with the matter of rentals for the storage of the Machine.

[40] The defendant explained that he had paid one Mr Chong Kok Kiong of Weng Hwa Press Sdn Bhd for the rental of its premises from June 2005 to May 2006. Three payments had been made; each time with different currencies depending on what he had on his person at the time when he wanted to make payment. On the first occasion, he paid in Hong Kong Dollar, the second in US Dollar and the third was by a cheque for RM60,000. The sum of RM140,000 was arrived at after converting the payments in foreign currencies into Malaysian Ringgit. According to the defendant, the sums included the services of the landlord's operator and raw materials such as paper, ink, alcohol and electricity used in the test runs of the Machine. Because of this, the monthly rental varied depending on usage. The average rental was said to be RM12,000 per month. A letter dated 26 June 2006 confirming all three payments were tendered (p 137 bundle A).

[41] Although there is a signature of one Chong Kok Kiong on this letter and it appears to be the same as that appearing in the delivery order dated 12 June 2005, it does not bear the rubber stamp of Weng Hwa Press Sdn Bhd. Seeing that Mr Chong was not called to testify, that this letter was issued on the defendant's letterhead as opposed to Weng Hwa's and, that it was issued long after the events of payments, there is valid concern and serious doubt over its veracity. In any case, after scrutinising the letter very carefully, I find that it is not necessarily an acknowledgment of the receipt of the rentals by Mr Chong or even Weng Hwa. All that Mr Chong may be said to have done was signed 'for WENG HWA PRESS SDN BHD'. He did not acknowledge or confirm

the contents of the letter written by the defendant. In the face of such discrepancy, this letter is in fact of no assistance and the defendant's claim for this expense is not proved.

[42] I must also add that there was no evidence of the actual payments made by the defendant, be it in Ringgit, USD or HK Dollar. If Weng Hwa had indeed imposed these charges as far back as June 2005, it is puzzling why these charges were not highlighted or claimed by the defendant in any of his emails to the plaintiff, including that of 8 February 2006 (see p 35 bundle A). Instead, the defendant was quite contented to not mention this in his emails or contacts with the plaintiff. The only reasonable inference that can be drawn is that it is the defendant and not the plaintiff, who is to bear the costs of storage and repairs of the Machine.

[43] Next, is the claim for the costs of repairs and spare parts paid to Excel Point and World Tech, there is actually no evidence to show that they are in relation to the Machine. The figures in these invoices also differ from that set out in the defendant's email dated 8 February 2006 to the plaintiff. The invoices were also not current and no reasonable explanation was forthcoming for the delay in the issuance of the invoices as well as the discrepancies between the email and the invoices. There is also no evidence of payment by the defendant.

[44] Further, World Tech is a company in Hong Kong. The claims for HK250,000 and HK720,700 due to World Tech were supposedly for repairs to electrical parts and costs of parts. The defendant claimed that these sums were not paid to World Tech. Instead, by reason of the sale of the Machine to World Tech for HK1.6m, those sums due to World Tech were set off from the purchase price. There was no explanation as to why the Machine or any of its parts was sent to Hong Kong. There was also no evidence as to what those parts were. The defendant did however indicate that those parts were major components without which the Machine could not operate. Now, I find this testimony worrying. The bills from World Tech and Excel Paint were dated February 2006 and October 2005 but as early as July 2005, a print test had already been successfully conducted. I would think that such a print test could not have been successfully conducted unless the major component parts were in place and in operation. In such conditions, I agree with the plaintiff's contention that the validity of these bills and expenses is therefore suspect.

[45] There is also evidence before me that some of the repairs were as a result of the defendant's own incompetent repair work or work done incompetently by his engineer. In fact, some of these works were not necessary in the first place. The burden of proof is on the defendant to show that the repairs were necessary and were to the extent as claimed. None of the persons involved in

the repairs were called. In the defendant's own email of 27 February 2006, he can be seen clearly advising PW1 not to 'bother what you heard today. It is all because of CHIN the technician. Now CHIN is missing and I have to bear the consequences. No matter what, when you China customers comes, I will make sure everything is done properly and perhaps I will get BEN to clean up and re-spray again for free'.

[46] The evidence also shows that the defendant at the same time faced some financial difficulties. He then asked the plaintiff to absorb some of the expenses but the plaintiff refused. PW1 testified that from November 2005 to January 2006, he telephoned the defendant many times but 'he never answer my calls or return call despite numerous messages to him'. Finally, in an email dated 17 March 2006, the defendant responded:

> Sorry if I seem like always missing your call. I just returned yesterday via HK. Anyway I am not avoiding you nor your calls otherwise I wont be still contacting you. There are problems when I speak to the printer about the L440. Firstly, he said you quoted him EURO230.000. Secondly he wants RM650.000 for his SM102F 1984.
>
> But at EURO230.000 less RM650.000, this definitely wont work as there isn't room to recover my re-conditioning charges.
>
> I told him this wont do and ask him to bring up his price and he is still considering. But at the same time, I have approached other people at higher offers and some wants to trade-in their trash for a good price and also there are some that wants to retain some % until after the warranty and some offering crazy prices (there is a long history of this machine here in KL since it arrived from HK!)
>
> Anyway, I am still seeing more interested parties … I have 2 enquiries from Indonesia and also from Thailand. There are intending to come over to inspect.
>
> I am having a terrible bad throat and I cant really talk. You can try to call me tomorrow to keep the situation updated.
>
> Anyway, I am still here. Don't worry.

[47] I must pause to make this observation. it concerns the defendant's calculation of his claim. The total cost of rentals and repairs purportedly paid to Weng Hwa and Excel Point amounting to RM333,000 was converted into Hong Kong Dollar at the rate of HK2.085:RM1 to give a sum of HK694,305. That sum was then added to the sum allegedly due to World Tech, a sum of HK970,700 to give a grand total of HK1,665,005. That sum was in turn converted and pleaded as RM773,000.

[48] I find this calculation quite difficult to follow. Using the same conversion rate that the defendant had himself applied, that is HK2.085:RM1, that sum should be RM798,563.55. Yet, the defendant claimed a sum of

RM773,000. Even using the rate of HK2.1:RM1 which was the exchange rate in April 2006, the figures still do not reconcile. This alone shows the defendant's claims to be somewhat dubious.

[49] In any case, the figures submitted do not give credit for the sum of HK1.6m that the defendant received from World Tech for the sale of the Machine. That sum must be accounted for. Once done, it will be seen that the defendant was in fact only short of HK65,005 (HK1,665,005 – HK1,600,000) which would convert to the sum of RM31,177.46. That sum would be the defendant's real costs and expense that he could claim from the plaintiff, if that was in fact the arrangement between the parties. But for several reasons, the defendant is not entitled to these claims. First, because as determined earlier, the arrangements between the parties were that the defendant was to bear all costs related to the repairs. Second, I have further found that the repairs were not as numerous or serious as claimed by the defendant. In fact, the evidence tends to show that these claims are not genuine. Lastly, if there were any costs incurred in carrying out the repairs, such costs were occasioned by the incompetent work done by the defendant or by those under his care or control; and for which the plaintiff was not responsible. The upshot of all this is that the defendant is not entitled to these claims.

[50] Finally, the defendant claimed the right to retain the money made from the sale and further wants to be paid the costs of repairs. In my view, if the defendant was at all entitled to costs of storage and repairs, then he should deduct those costs and expenses from the amount collected from the sale to World Tech. He did not. I find this completely bewildering because the Machine is not the defendant's. Neither is he asserting so except for his reliance on the right to exercise a lien over the Machine. To allow this claim in the manner pleaded would not only be wrong but undoubtedly cause an element of unjust enrichment to the defendant.

CLAIM FOR ASSAULT AND HARASSMENT

[51] The defendant also claimed damages suffered in relation to trauma and shock that he said that he experienced as a result of actions taken by the plaintiff towards recovering its money. Learned counsel has suggested a sum of RM100,000 as a suitable amount. I do not propose to recount the related events which I had already set out at the start of this judgment. Ms Yong Kai Ritmman (PW2) is PWTs wife. She came forward to testify especially on this issue.

[52] Learned counsel for the defendant has relied on *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497 and *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337 in arguing that the

plaintiff is vicariously liable for the acts of PW1 and PW2. She maintained that their acts or conduct were so closely connected with the acts that they were authorized to do, that is debt collection, that these acts were modes of carrying out the debt collection. The plaintiff must therefore be responsible for their acts. Learned counsel further maintained that assault may be committed by words or gestures alone, and in certain circumstances, assault may be committed through telephone calls, as was the case here. She relied on *R v Ireland* [1998] AC 147 where it was held that the caller of a silent telephone call which caused fear of immediate and unlawful violence in the person who received the call is guilty of an assault. Several other cases were also cited in support.

[53] The problem I have with this claim is similar to that for the defendant's counterclaim — the lack of proof. The law of assault and battery is clear, that assault may be committed even through silent or loud telephone calls. The acts of employees or agents can be imputed to employers such that corporate soles like the plaintiff can be found vicariously liable for such acts of assault. But, whether assault as alleged exists is a question of proof. Other than the defendant's testimony I have no other evidence, most importantly to corroborate his allegation. The defendant's recount of the events is rebutted by both PW1 and PW2. Both witnesses for the plaintiff remained unshaken and their testimonies are intact despite the rigorous cross-examination by learned counsel for the defendant. PW2, in particular, gave clear and calm testimony and explanation of the events. Although passports of PW1 and PW2 were not tendered, they were nevertheless shown to the defendant's counsel and to the court during the course of trial. There were no entries in these passports showing that PW1 and PW2 were in Hong Kong at the time as alleged by the defendant. PW2 was also cross-examined on her brothers, the object of the defendant being to establish links between her brothers and 'Ah SoonTRockef. None was established.

[54] Further, the defendant has not called the person who supposedly confronted him. None of his family members were called to confirm or support his assertions and claims. In the absence of independent evidence, an allegation of such serious magnitude would require more proof than just that of the oral testimony of the defendant which I find not credible. This claim is entirely dependant on facts which if not established must necessarily mean that the claim is not proved. The measure of damage in such an event is therefore immaterial.

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testimony of the defendant which I find not credible. This claim is entirely dependant on facts which if not established must necessarily mean that the claim is not proved. The measure of damage in such an event is therefore immaterial.

[56] In any case, there is also no proof of the damage allegedly sustained. Learned counsel conceded that the sum of RM100,000 proposed was a mere proposal unsupported by evidence or case law. The law here is clear and without such proof, the claim cannot be entertained by the court. In the circumstances, the counterclaim in this regard must also be dismissed.

CONCLUSION

[57] I am therefore of the view that the plaintiff has satisfactorily proved its claim on a balance of probabilities. As for the counterclaim, I am not satisfied that the defendant has proved his claim and I dismiss it.

[58] Accordingly, I allow the plaintiff's claim of €227,000 which is equivalent to RM1,098,680 together with interest at the rate of 4%pa from the date of judgment to the date of realisation. I further order costs of RM75,000 as proposed by both counsel. I agree that having regard to the circumstances, the issues and time spent, that this is an appropriate amount.

Plaintiff's claim allowed with interest and costs.

Reported by Kohila Nesan